Superfund Remedial Program Review: Leveraging Special Accounts Action Plan

I. Introduction

Special accounts are site-specific, interest bearing sub-accounts within the Superfund Trust Fund used to fund site-specific work. The Agency's goal for the establishment and use of special accounts is to ensure responsible parties pay for cleanup by providing potentially responsible party (PRP) settlement dollars to fund future response work. Through the use of special accounts, appropriated Trust Fund resources can be conserved for sites where PRP resources are not available.

II. Background

At the end of FY 2012, a balance of \$1.8 billion was available in 1,011 open site-specific accounts. Since the inception of special accounts through the end of FY 2012, the EPA has collected and earned interest totaling approximately \$4.3 billion in special accounts. More than \$2.4 billion has been disbursed or obligated to finance site response actions from special accounts. In addition, EPA has transferred over \$21.9 million to the Superfund Trust Fund and closed 164 accounts.

The establishment, planning, and use of special accounts require extensive coordination among the regions and Headquarters offices. In order to further improve management, transparency, and accountability among the offices involved with special accounts, the Special Accounts Senior Management Committee (SASMC) was officially established in April 2009 in response to a recommendation by the Office of Inspector General to centralize EPA's management of special accounts. Current members of the SASMC are the Directors for OSWER's Office of Superfund Remediation and Technology Innovation (OSRTI), OECA's Office of Site Remediation Enforcement (OSRE), OCFO's Office of Financial Management (OFM), Office of Budget (OB), and Office of Financial Services (OFS), the Region 6 Superfund Division (Superfund Lead Region), and the Region 2 Office of Policy and Management (Management Lead Region). The Director of OSRTI serves as the Chair of the Committee. The Committee is responsible for the following activities:

- Determine the status of special accounts (e.g., number of accounts, available balance, etc.);
- > Ensure the use of special account funds is generally consistent with EPA special account guidance;
- > Evaluate the activities being conducted by respective offices for the management of special accounts;
- Ensure that regional offices carry out planned reclassifications and transfers of special account receipts to the general portion of the Superfund Trust Fund;
- ➤ Review the Superfund Special Accounts Management Strategy and prioritize (or revise) activities to implement the Workplan associated with the Strategy;
- > Discuss and resolve policy, procedure, or operational issues associated with the management of special accounts;
- As needed, discuss ongoing responses to Office of Inspector General (OIG)/Government Accountability Office (GAO) audits; and
- Address other topics, as needed.

Congress, the Office of Management and Budget (OMB), and EPA senior managers have expressed concerns regarding EPA's use of special account funds to facilitate site response actions. In particular, there is an expectation that with more than \$1.7 billion available in special accounts EPA's use of special account funds will continue to increase over prior fiscal years. While the use of special account funds is dependent on the particular factors for each settlement and the specific stage of site response, EPA should be looking for every opportunity to move site responses forward if funds are readily available in a special account to do so. Over the past 4 years the SASMC has undertaken a number of initiatives and directives to improve EPA's management and use of special accounts. Chief among them was development of a Monitoring Plan for

¹ The Charter establishing the SASMC can be found at: http://intranet.epa.gov/osrti/topics/pdf/FinalSignedCharterforSFSpecialAccountsSrMgmtCommittee.pdf. INTERNAL DELIBERATIVE – DO NOT CITE OR QUOTE 7/15/13

Special Account Planning Data² that outlines EPA's process for routinely reviewing special accounts to ensure their most effective and efficient use. Accounts are reviewed at least semi-annually during annual work planning and mid-year reviews. Particular areas of focus for the regions and Headquarters when reviewing special accounts include: sites with special accounts that have plans to use appropriated resources in the current fiscal year, accounts where the site achieved construction completion 15 years ago or more or the site is deleted from the NPL, accounts with "Other" planning estimates or funds planned for contingent future uses, accounts with available balances of more than \$1 million, and accounts where less than 30% of all collections and interest earned has been disbursed or obligated, or \$0 has been obligated or disbursed from the account in the past 5 years. The data from these reviews are used to report to EPA senior managers in OSWER, OECA, and OCFO, as well as OMB and Congress, EPA's plans for utilization of special account resources.

The Superfund Program Review established a subgroup, Leveraging Special Accounts. The membership of the subgroup consists of staff that participate on the SASMC as well as special account contacts in each region. The subgroup has reviewed the recommendations from the Superfund Program Review, and its action plan for the recommendations follows.

III. Immediate Recommendations – shorter term

Recommendations 1 and 2: Use of special accounts for oversight costs

Recommendation text from the Superfund Program Review Steering Committee:

- 1. To the maximum extent practicable, expand use of Special Accounts to ensure all EPA activities on PRP-lead sites are funded by Special Accounts to preserve appropriated funds. This includes expanding the practice of requiring PRPs to pre-pay oversight costs in accordance with current Agency guidance at all applicable PRP-lead sites. For older consent orders or decrees that do not contain special account provisions, streamline procedures for redirecting oversight payments to special accounts rather than the treasury to fund any ongoing or future work. Use of Special Account funding for all extramural and most intramural needs at PRP-lead sites will preserve appropriated dollars for sites with no viable PRP(s).
- 2. Establish special accounts to fund oversight activities instead of using appropriated "pipeline" funds and cost recovering in the future.

Discussion:

Use of special accounts for oversight activities

EPA policy and guidance currently states that if special account funds are available, they should be used prior to appropriated resources for response actions at a site, which includes oversight of PRP actions. There are some instances where it is appropriate to use appropriated dollars for PRP-lead sites, such as where the PRP is doing work under a UAO and EPA does not have funds in a special account for the site. In addition, some sites may have charged both special account and appropriated dollars for work if the special account does not have enough funds or there are limitations on the use of the special account stipulated in the agreement the funds were collected under.

An analysis of historical spending for oversight activities shows a shift in funding from appropriated dollars to special account funds for oversight activities (see Appendix for data analysis). The shift from appropriated funds to special account funds for oversight activities is much more apparent in extramural resources than payroll. While the overall dollar amount spent from appropriated funds for oversight has decreased, most of that shift has been in extramural spending. The vast majority of appropriated funds used for oversight activities is now for payroll. Part of the discussion in the Budget Subgroup for the Superfund Program Review was that some regions have developed an internal policy where if oversight cannot be funded with special account funds, it is being

² The Monitoring Plan for Special Account Planning Data can be found as Attachment 1 to the April 2, 2012 memorandum, "Effective Utilization of Superfund Special Accounts." The memorandum can be found at: http://www.epa.gov/superfund/pubs/pdfs/SF%20Special%20Accounts Effective%20Utilization%20Memo.pdf.

shifted in-house to preserve extramural resources for non-oversight activities. This may in part explain why there has been an overall increase in payroll charging for oversight activities.

PRP pre-payment of oversight costs

It is a general good management practice to require PRPs to pre-pay oversight costs. Guidance was issued December 22, 2006 entitled, "Additional Guidance on Prepayment of Oversight Costs and Special Accounts." There has been some difficulty for EPA in getting PRPs to prepay oversight costs for a variety of reasons, including the PRPs desire for assurances that may lead to capping EPA's oversight costs and difficulty in accurately estimating oversight because of too many variables to properly cost out. While the prepayment of oversight costs does minimize the use of appropriated funds the first year of oversight, when the work and EPA's oversight are done there are additional steps and analysis required by the finance offices to ensure any overpayment is returned to the PRP, if applicable under the terms of the settlement.

Streamline procedures for redirecting oversight payments to special accounts

When the original agreement does not contain special account language, regions are currently required to notify Headquarters of their intent to establish a special account or deposit newly received funds into an existing special account. Modification of the original agreement is not necessary because EPA is still receiving the funds pursuant to an agreement, as required by CERCLA 122(b)(3). The April 22, 2011 Model Notifications memorandum requires only an email notification, rather than a formal memorandum, as sufficient notification for Headquarters. In the past 2 years, Headquarters has received only a few notifications and does not take any action on them.

Action Plan: Use of special accounts for oversight costs

The Special Accounts subgroup chair and representatives will propose the following actions to the Special Accounts Senior Management Committee (SASMC) at their July 2013 meeting and will proceed as directed by the SASMC.

- a. Emphasize the use of special accounts for payroll (and possibly travel) associated with oversight activities as part of the site-specific charging fact sheet OSRE is developing.
 - Include a reminder in the fact sheet that special account balances have to be closely monitored when charging payroll as negative account balances are typically the result of charging payroll to a special account after the account has been depleted. Regions should carefully monitor special account balances where payroll is being charged and correct any negative balances identified during OFS' quarterly reviews, which will require staff resources to effectively monitor.
 - In order to facilitate use of special accounts for payroll, discuss developing a site charging cheat sheet for RPMs, OSCs, enforcement, legal and other regional staff as part of the fact sheet currently being developed.
 - OSRE is leading the effort to draft the fact sheet in coordination with the SASMC. The regional
 special accounts network, which includes regional program, finance, and legal staff that work on
 special accounts, will have an opportunity to review and comment on the draft fact sheet before it
 is finalized.
 - Pending approval by the SASMC, goal would be to issue the fact sheet by December 2013.
- b. Encourage regions to use special account dollars for oversight activities through a memorandum from the OSRTI Office Director (on behalf of the SASMC) to regional Superfund Division Directors, Regional Counsel, and ARAs. OSRTI will take the lead in drafting the memo in coordination with the SASMC. A draft of the memo will be shared with the regional special accounts network for their review and input

³ "Additional Guidance on Prepayment of Oversight Costs and Special Accounts," December 22, 2006, is available at: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/spec-acct-oversight.pdf.

⁴ "Model Notifications to Headquarters of Milestone Special Accounts Transactions," April 22, 2011, is available at: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/sa-mod-notice-trans-mem.pdf. "Consolidated Guidance on the Establishment, Management, and Use of CERCLA Special Accounts," p. 3, October 4, 2002 is available at: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/congui-estmgt-specacct.pdf.

prior to finalization. Pending approval by the SASMC, goal would be to issue the memo by January 2014. The memo should:

- Take credit for increased use of special account dollars for these activities already, but acknowledge there is room for improvement.
- ii. Encourage activities meant to increase special account use for oversight but recognize regions need flexibility.
- Emphasize oversight activities for Superfund Alternative sites should generally be funded from special accounts.
- iv. Emphasize the need for oversight billings to be done in a timely manner so that EPA has funding to continue oversight. Remind regions to evaluate oversight payments and current special account balances prior to placement of funds in the special account, as the oversight payments typically include both direct and indirect charges. A good management practice regions may want to consider is placing payments into the Superfund Trust Fund if the special account has enough funds for future activities at the time of the payment.
- v. Encourage regions to use prepayment provisions in settlement agreements for oversight activities per the December 22, 2006 prepayment guidance.
- vi. The 4/2/12 Effective Utilization memo currently states that funds may be retained for more than 15 years after site construction completion is achieved depending on site specific circumstances. Clarify in this memo that retaining and using funds in special accounts for oversight of PRPs is an appropriate site specific exception for retaining funds more than 15 years after site construction completion.
- c. Modify the notification requirements so that regions are no longer required to notify Headquarters if they will be depositing funds in a special account rather than the Trust Fund where the original agreement is silent on special accounts. Instead, advise regions they should make a note in the site file of the change in where the payments are deposited. Regions would still be required to inform CFC, but this would be done through the accounts receivable process already established. Discuss with the SASMC if this modification to the notification requirements needs to be a separate transmittal amending the April 2011 Model Notifications memo or if it could be included as part of the memo discussed above. Decision to be made by the SASMC at their July 2013 meeting.

d.	Exemption	5 -	Delibe	rative	Process	

No action is required by the SASMC on this proposal.

<u>Recommendation 3</u>: Use in-house resources if special account funds can't be used for PRP-lead sites

Recommendation text from the Superfund Program Review Steering Committee:

Review how Pipeline funds are being used at RP lead sites. Use special accounts, to the extent possible, to pay for everything at RP lead sites, particularly oversight at RP lead sites. If special account funds cannot be used for an RP lead site, then oversight, to the extent possible, should be done in-house so that limited Pipeline and RA resources are used for Fund lead sites.

Action Plan: Use in-house resources if special account funds can't be used for oversight

The Special Account subgroup proposed moving this recommendation to the In-house Resources subgroup. The use of in-house resources if special account resources are not available is outside the scope of special account guidance and policy. No action is required by the SASMC on this proposal.

Recommendation 4: Close low balance special accounts

<u>Recommendation text from the Superfund Program Review Steering Committee</u>: Incentivize the closing out of old or low balance special accounts.

Discussion:

There are currently more than 1,000 open special accounts for more than 930 Superfund sites. The benefits of closing accounts are that there would be fewer accounts to manage and oversee and allow more time to focus on open, active accounts. In addition, the closure of accounts shows progress in EPA's ability to effectively manage special accounts by not allowing funds or accounts to sit idle if there is no future use.

Regions may keep relatively small amounts in a special account rather than close the account because the special account has funds readily available if something comes up at the site rather than having to request appropriated funds. If funds are transferred to the Superfund Trust Fund prior to account closure, they are no longer available to EPA until appropriated by Congress. Because there is no guarantee of future funding if the special account is closed, regions have no incentive to close special accounts even when future work at the site is minimal or complete. Currently, OSRTI policy is that any action that is statutorily required (e.g., five year reviews) or presents a danger to human health will be funded. However, OSRTI cannot assure funding for anything besides statutorily required actions, as annual funding from congressional appropriations varies from year to year.

The subgroup discussed at length how to 'incentivize' the closing of special accounts with low special account balances. The subgroup concluded that while it would be difficult to incentivize these actions given the low dollar amounts involved, a greater focus by senior managers on these accounts may help to facilitate the closure of accounts no longer needed to improve EPA's management of special accounts.

The Superfund Program Review Steering Committee also discussed the feasibility of utilizing the fiduciary reserve to allow for the closure of special accounts where unliquidated obligations remain associated with an account. The Special Accounts subgroup did not discuss this option.

Action Plan: Close low balance special accounts

The Special Accounts subgroup chair and representatives will present the following proposal to the Special Accounts Senior Management Committee in July 2013 and implement their decision.

• Regional Superfund Division Directors should annually review open special accounts with less than \$10,000 available for potential closure. Headquarters will provide a list of accounts that should be reviewed as part of the annual work planning special account data review. Headquarters will filter the open accounts with less than \$10,000 available to include only those where no future deposits are expected (post transition to SEMS). This review will be done in coordination with the Regional Superfund Division Director review of accounts with more than \$1 million available or \$0 obligated/disbursed in the past 5 years, and an update to the Monitoring Plan for Special Account Planning Data will incorporate these changes.

IV. Future work recommendations - longer term

Discussion:

Recommendation 5: Evaluate future work requirement for special accounts

Recommendation text from the Superfund Program Review Steering Committee:
Exemption 5 - Deliberative Process

EPA guidance requires there to be future work at a site and costs to be incurred in order for regions to establish and/or place funds from a PRP in a special account. ^{5,6} Past costs recovered from PRPs can be placed in special accounts, but only if those funds are needed for future work at the site. Past costs recovered for sites where there is no future work are deposited in the Trust Fund as cost recoveries for future appropriation by Congress.

Legal Analysis Required:

CERCLA 122(b)(3) states, "If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement."



Benefits & Issues:



Action Plan: Evaluate future work requirement for special accounts

Because of the issues identified above, the subgroup recommends discussing this recommendation with the Special Accounts Senior Management Committee at their July 2013 meeting Exemption 5 - Deliberative Process

If the SASMC agrees to proceed, SASMC staff will develop an issue paper for OGC requesting a legal analysis of the future work requirement.

V. Evaluation Considerations

a. Evaluation of Recommendations 1 and 2

- -Increase regional awareness of using special accounts for PRP oversight.
- -Decrease the use of appropriated resources for oversight activities.
- -Reduce the workload of staff in the regions by no longer requiring notifications to Headquarters where payments will be deposited in a special account and the original agreement was silent on special accounts.

b. Evaluation of Recommendation 3

-This recommendation should be moved to the In-house Resources subgroup. The Special Accounts subgroup did not develop an action plan or evaluation criteria for this recommendation.

c. Evaluation of Recommendation 4

-Increase the number of special accounts that are closed per year. The number of special accounts closed is monitored quarterly by OSRTI and provided to regional Superfund Division Directors and the SASMC.

⁵ "Placement of Proceeds from CERCLA Settlements in Special Accounts," (January 27, 2000)

 ^{6 &}quot;Consolidated Guidance on the Establishment, Management, and Use of CERCLA Special Accounts," (October 4, 2002)
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OSRTI will also report on the status of closed accounts in the annual report to EPA senior managers on SASMC activities.

d. Evaluation of Recommendation 5

-At this time it is premature to identify any evaluation criteria for this recommendation.

APPENDIX: Spending on Oversight Activities

These charts are based on appropriated and special account spending from the Compass Data Warehouse on 4/10/13. Oversight activities were defined as projects using the following action codes:

BB – PRP Removal

BD – PRP RI/FS

NK – PRP FS

NA – PRP RI

BE - PRP RD

BF – PRP RA

ME – PRP LR

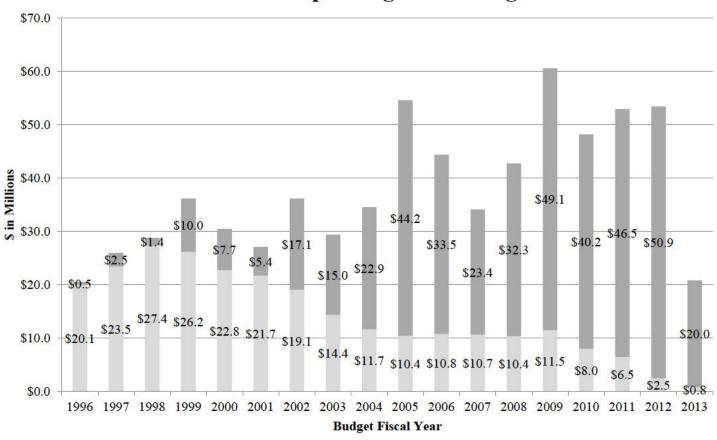
[&]quot;Spending" includes open commitments, unliquidated obligations, and expenditures as of 4/10/13 in CDW.

[&]quot;Extramural" spending was defined as all spending not in BOCs 10 (PCB), 21 (travel), and 28 (site travel).

[&]quot;Payroll" spending was defined as spending in BOC 10 (payroll).

<u>Chart 1</u>: Total extramural spending for oversight activities has increased over time. The amount from special accounts to support these actions has increased and the amount from appropriated resources has decreased.

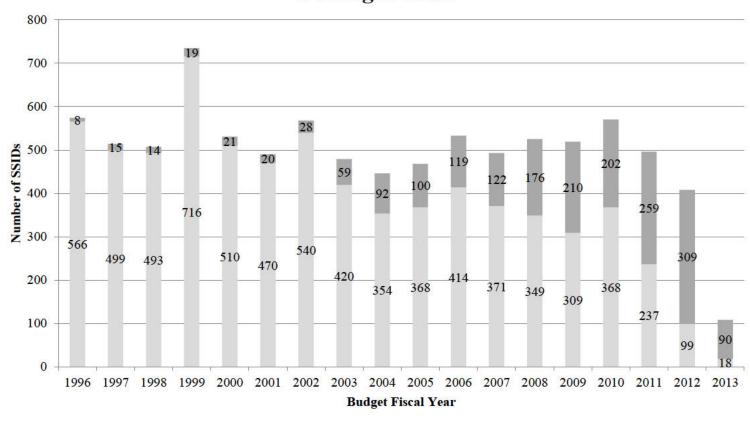
Chart 1 - Extramural Spending for Oversight Activities



■ Appropriated Funds ■ Special Account Funds

<u>Chart 2</u>: The number of SSIDs that have charged oversight activities to a special account has increased over time, and the number of SSIDs that have charged oversight activities to appropriated funds has decreased. (Note: SSIDs that charged both appropriated and special account dollars in the same year would be double-counted)

Chart 2 - Number of SSIDs with Extramural Spending for Oversight Costs

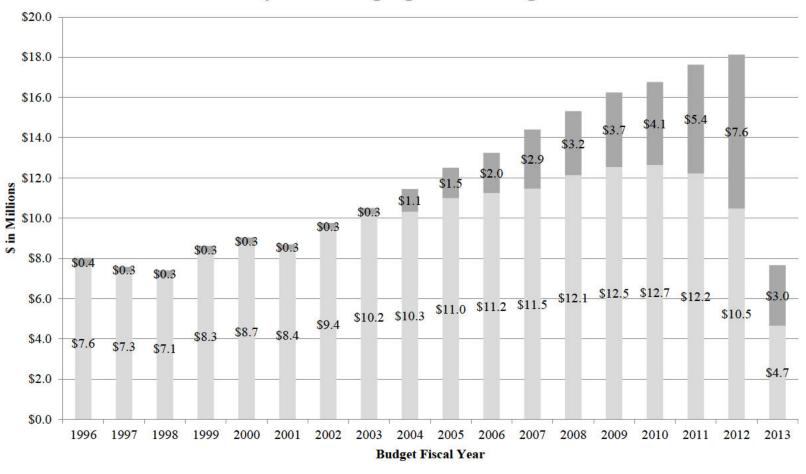


■ Number of SSIDs Using Appropriated Funds

■ Number of SSIDs Using Special Account Funds

<u>Chart 3</u>: The total amount of payroll charged for oversight activities has increased over time. The amount of payroll from special accounts has increased, but more payroll is still being charged to appropriated funds for oversight activities than to special accounts.

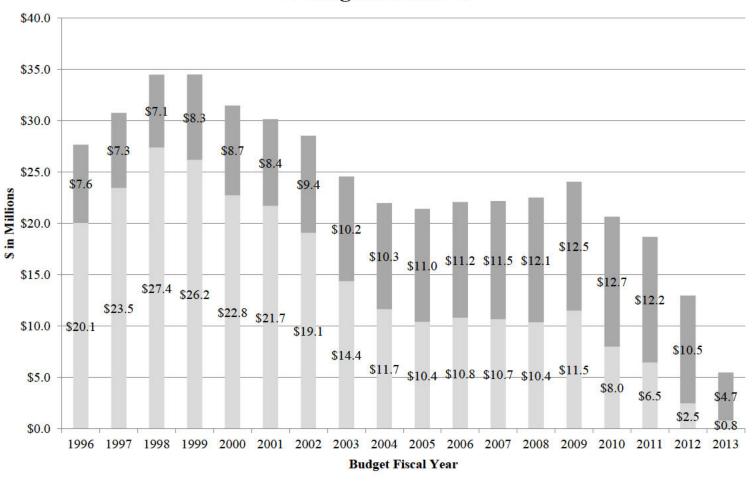
Chart 3 - Payroll Charging for Oversight Activities



Appropriated - Payroll Special Accounts - Payroll

<u>Chart 4</u>: Depicts total appropriated funds used for oversight activities (i.e., both extramural and payroll). Appropriated funds used for oversight activities have declined over time. A larger share of appropriated funds is now used to support payroll than extramural needs for oversight activities.

Chart 4 - Spending of Appropriated Resources for Oversight Activities



■ Extramural ■ Payroll

<u>Chart 5</u>: Depicts total special account funds used for oversight activities (i.e., both extramural and payroll). Special account funds used for oversight activities have increased over time. A larger share of special accounts funds are used to support extramural needs than payroll for oversight activities.

Chart 5 - Spending of Special Account Resources for Oversight Activities

